

05-375 SEP 22 2005

No. 05-____

IN THE
Supreme Court of the United States

REGIONS BANK, GUARDIAN OF THE ESTATE OF
KIMBERLY RENE SMITH

Plaintiff/Appellant

v.

BMW NORTH AMERICA, INC. AND BMW AG,

Defendants/Appellees.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judgment resting upon a general verdict may be affirmed despite legal error at trial where it cannot be determined whether the jury relied upon the legal error in rendering its verdict.

PARTIES TO THE PROCEEDINGS

Kimberly Renea Smith was the plaintiff below in the district court and is a citizen of Arkansas. Regions Bank subsequently became legal guardian of the estate of Kimberly Smith and was substituted as plaintiff. Regions Bank has its principal place of business in Arkansas.

BMW North America, Inc. and BMW AG, defendants below, are citizens of Delaware and New Jersey and Germany, respectively.

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**On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Regions Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. at 1a) is reported at 406 F.3d 978 (8th Cir. 2005). That court's denial of Petitioner's motion for rehearing or rehearing *en banc* (App. at 7a) is unpublished. A prior decision by the Eighth Circuit in this case is reported at *Smith v.*

BMW North America, Inc., 308 F.3d 913 (8th Cir. 2002).¹

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 9, 2005. A motion for rehearing and rehearing *en banc* was denied on June 24, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2111 provides:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Kimberly Renea Smith was severely injured when she lost control of her BMW 318i on a road through a mountainous part of North Arkansas. Smith's car left the road, hit an embankment, rolled over onto its roof, and eventually came to rest. App. at 1a. The driver airbag failed to deploy. Although she was wearing her seatbelt, Smith suffered a broken neck in the accident, 308 F.3d at 917. She will remain a quadriplegic for the rest of her life.

¹ Regions Bank was substituted as plaintiff after it became Ms. Smith's legal guardian.

Smith brought suit against BMW, alleging that its airbag was defective and that BMW was negligent in marketing an uncrashworthy car. App. at 3a-4a. BMW argued that the car did not crash into the hillside with sufficient front-end force to trigger the airbag. In addition, BMW argued that Ms. Smith was contributorily negligent.

Prior to trial, Smith moved *in limine* to exclude evidence of tests of her blood serum alcohol level after the accident. App. at 2a. Smith argued that her level of intoxication was entirely irrelevant to whether the airbag should have deployed upon impact with the hillside. If the jury found, as BMW argued, that the initial impact was not a deployable event, BMW would not be liable and there would be no fault to compare against Smith's. Moreover, evidence that Smith was driving while intoxicated would be highly prejudicial, inviting the jury to decide the case on an improper basis and without regard to the evidence. See *Brief of Appellant, Regions Bank v. BMW North Am. Inc.*, 406 F.3d 978 (8th Cir. 2005) (No. 04-2273), at 20-21 & 26. After a hearing, the district court denied Smith's motion. App. at 2a.

At trial, the defense presented four witnesses, all of whom were experts. Over Plaintiff's objection, Dr. Henry Simmons testified for approximately one hour and fifteen minutes concerning Ms. Smith's alcohol consumption. He surmised that Ms. Smith was a "problem drinker." *Brief of Appellant* at 9. He stated that a typical person with that level of alcohol in her blood would be emotionally unstable, having decreased inhibitions, having reduced ability to make critical judgments, having impaired memory, having impaired ability to understand information, and having decreased response time and muscular

coordination. App. at 3a. During closing argument, defense counsel emphasized that Smith's intoxication was "a highly significant fact which can explain everything that happened in this accident." See Brief of Appellant at 10.

The trial judge instructed the jury that if they determined that BMW was without fault, or that Smith's fault was greater than or equal to BMW's fault, Smith was not entitled to recover any damages. Regarding intoxication, the district court instructed that it was unlawful under Arkansas law for a driver with a blood alcohol level of .10 percent or greater to operate a motor vehicle. Violation of this statute would constitute evidence of negligence to be considered along with all of the other evidence in the case. App. at 4a.

The jury found for BMW returning a general verdict form which stated, in its entirety: "We, the jury, find for the defendants." App. at 5a.

Plaintiff appealed to the Eighth Circuit, arguing that applicable Arkansas law would exclude evidence of a driver's intoxication as irrelevant and unfairly prejudicial in a crashworthiness case alleging a defect in the passive restraint system.² Brief of Appellant at 14-26. The court of appeals did not reach this issue, but held that any error on this score did not warrant reversal. App. at 5a.

"It is possible," the court below acknowledged, "that the jury reached this verdict by assigning fault

² To the extent no existing precedent of the Arkansas Supreme Court controls this issue, Rule 6-8 of the rules of the Supreme Court and Court of Appeals of the State of Arkansas authorizes the court to answer certified questions from any court of the United States.

to Smith on the basis of her alcohol consumption, comparing her fault to BMW's fault, and concluding that Smith's fault was equal to or greater than BMW's fault." App. at 5a. Assuming the introduction of evidence of Smith's intoxication was erroneous, the error was clearly one affecting her substantial rights. See 28 U.S.C. § 2111. That evidence was the sole and entire basis for BMW's contributory negligence defense.

However, the court continued,

[T]here are two other possibilities *that are at least as likely*, neither of which rests on the evidence of Smith's blood alcohol content. First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover-when deployment of the airbag would not have helped.

App. at 6a (emphasis added).

"We have no way of determining from this general verdict why the jury found [BMW] not liable," the court concluded. App. at 5a. Because Smith was unable to prove which issue formed the basis of the jury's decision, "we can only speculate whether . . . plaintiff's substantial rights were

affected, and we will not set aside the jury's verdict in this case." App. at 6a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH LONGSTANDING PRECEDENTS OF THIS COURT.

The lower court in this case adopted what Judge Kozinski has condemned as "a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court." *Kern v. Levelor Lorentzen, Inc.*, 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting).

In fact, this Court long ago established a bright line rule requiring reversal in civil cases when a jury could have based its general verdict upon inadmissible evidence. In *Maryland v. Baldwin*, 112 U.S. 490 (1884), plaintiff sued the administrators of a decedent's estate, who raised several defenses to the claim. Justice Field, writing for the Court, noted that "if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered." However, the jury returned a general verdict for the defendants, "prevent[ing] us from perceiving upon which plea they found." *Id.* at 493. In such a circumstance, the Court found it "impossible to say what effect [the improper evidence] may have had on the minds of the jury." *Id.* at 494. The Court set forth what has become known as the "*Baldwin*" or "general verdict" rule:

If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for

it may be by that evidence the jury were controlled under the instructions given.

Id. at 493. The appropriate course, the Court stated, was to order a new trial. *Id.* at 495.

Over the course of more than a century, this Court has consistently reaffirmed its general verdict rule. The Court applied the rule to multi-count claims in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). Plaintiff sued for the wrongful death of her husband in a mine explosion, presenting the jury with eight different allegations of negligence. Following the jury's general verdict for the plaintiff, this Court determined that three of the counts were not supported by evidence. *Id.* at 78-79. Citing *Baldwin*, the Court stated that "where it is impossible from the record to say upon which of the counts of the declaration the verdict was based," the judgment must be vacated. *Id.* at 79. Nor, the Court pointedly added, can the judgment "be sustained upon the theory that substantial rights of the objecting party had not been invaded." *Id.*

Similarly, in *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959), plaintiff sued for the death of an electrician working aboard a pilot boat, alleging both the unseaworthiness of the vessel and negligence of the vessel owners. This Court upheld the negligence claim, but concluded that the unseaworthiness claim should not have been submitted to the jury because Halecki was not a member of the ship's crew. *Id.* at 615-19. The Court remanded for a new trial, "for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id.* at 619.

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), a civil anti-trust action, this Court held that it was error to instruct the jury that three overlapping and affiliated entities could be found guilty of conspiring with each other. 370 U.S. 25-26. Because the jury's general verdict in this multi-count case may have rested on that erroneous submission, the Court stated that the *Baldwin* rule required reversal. *Id.* at 29-30.

More recently in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court held that a general verdict in an antitrust action "cannot be permitted to stand (since it was based on instructions that erroneously permitted liability" in violation of *Parker* and *Noerr* immunity). *Id.* at 384. Significantly, Justice Scalia wrote for the majority that if the evidence was sufficient to sustain a verdict on a separate basis, respondent was not entitled to affirmance of the tainted verdict, but instead to a new trial. *Id.*

The Court's application of the rule in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), makes clear that it is the verdict winner who bears the risk that the basis for the jury's general verdict may not be knowable. Thus reversal was required where the district court erroneously instructed that the jury could hold petitioners liable for attempted monopolization under § 2 of the Sherman Act, and "the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone." *Id.* at 459-460.

This Court's rule remains an eminently sensible one. Where the jury may have decided the case based on inadmissible evidence (as in *Baldwin*),

an improper instruction (*Sunkist*), or an erroneous legal theory (*Halecki*), the legal error clearly affects the substantial rights of the losing party. As the Court has explained, the nature of the general verdict makes it impossible to know whether the jury decision was unaffected by the error. In that circumstance, it is appropriate that the party which benefited from the legal error should bear the risk that harmlessness might be difficult or impossible to prove.

The court below in this case disregarded this Court's established rule. Indeed, it adopted the opposite approach. As in *Baldwin*, there was no indication here that the jury was unaffected by the prejudicial evidence of Smith's intoxication. Indeed, the court conceded that it was "at least as likely" that the jury relied on that evidence to render a defense verdict. App. at 6a. Nevertheless, the court constructed a presumption that the jury ignored the prejudicial evidence of intoxication and instead based its decision solely on BMW's other defense – that the airbag itself was not defective. This presumption, as the court itself indicates, is essentially irrebutable in the face of the jury's general verdict. Plaintiff could prevail on appeal only by showing that it was error to admit evidence of intoxication as contributory negligence *and* that each of BMW's other defenses was also tainted by error. Such a result conflicts with this Court's sensible rule in *Baldwin* and its progeny.

Contrary to the lower court's view, this Court's *Baldwin* rule requires no "speculation" as to the jury's thinking. App. at 6a. It simply establishes a presumption that a prejudicial error affected the decision of the jury. The Eighth Circuit has reversed that presumption and placed an insurmountable burden on the party that was disadvantaged by a

legal error. As a consequence, many errors of law will not be corrected – or, as in this case, not even be addressed.

II. THE COURTS OF APPEAL ARE IN CONFLICT CONCERNING APPLICATION OF THIS COURT'S GENERAL VERDICT RULE.

A. The Majority Rule.

Contrary to the Eighth Circuit's approach, the great majority of circuit courts of appeal faithfully apply this Court's general verdict rule. *See, e.g.,*

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 134 (1st Cir. 1997);

Morrissey v. Nat'l Maritime Union of Am., 544 F.2d 19, 26 (2d Cir. 1976);

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 534-35 (3d Cir. 1998);

Crowell v. Angelus Sanitary Can Machine Co., 2000 WL 991616 (4th Cir. 2000) at *3 (reversal required where "the district court erred by instructing the jury on contributory negligence [and] we cannot determine from the general verdict whether the jury's decision was based on a finding that Angelus was not negligent or a finding that Crowell was contributorily negligent.");

Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1286 (5th Cir. 1992);

Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993);

Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999);

Richards v. Michelin Tire Corp., 21 F.3d 1048, 1056 n.13 (11th Cir. 1994);

North Am. Graphite Corp. v. Allan, 184 F.2d 387, 389 (D.C. Cir. 1950);

Mitsubishi Elec. Corp. v. Ampex Corp., 190 F.3d 1300, 1303 (Fed. Cir. 1999);

B. Harmless Error

Without the benefit of guidance from this Court, a number of circuit courts have grafted onto the *Baldwin* rule a harmless error exception to permit affirmance of a general verdict where the appellate court can state with some degree of certainty that the error below did not affect the jury's decision.

The appellate courts vary in their formulation of the showing required of the party seeking affirmance. *See, for example, Davis v. Rennie*, 264 F.3d 86, 106 (1st Cir. 2001) (appellate court must be "reasonably certain that the jury's verdict did not rest on [an] erroneous basis."); *Bruneau v. South Kortright Central School Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998) ("reasonable certainty"); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 122 (3d Cir. 1999) (where erroneous instruction could not "by any stretch of the imagination change the verdict, we need not reverse"); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991) ("[T]he court must remand the case for a new trial unless it is 'reasonably certain' that the jury's verdict was not influenced by" the error.); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984), *cert. denied*, 469 U.S. 883 (1984) (the court was "reasonably certain" that the jury verdict was not "significantly affected" by error); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) (court may affirm when

it can say with "absolute certainty" that the jury did not rely upon the error; the possibility that the jury relied upon the error, "even if remote," requires reversal).

Previously, the Eighth Circuit had also espoused the general rule with a harmless error exception. For example, in *Webber v. Sobba*, 322 F.3d 1032 (8th Cir. 2003), the court concluded that reversal was required where the "jury's general verdict leaves us with no idea whether the jury relied upon the erroneous instruction when rendering its verdict" unless it can be shown that "additional factors make it clear that the error was harmless." *Id.* at 1038. To hold otherwise would lead the court to "invad[e] the province of the jury" to determine the evidence upon which the jury relied. *Id.*

The Ninth Circuit Court of Appeals adopted its own similar approach – one that emphasizes discretion on the part of the reviewing court. *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980), held that when one of several theories submitted to the jury lacked evidentiary support, "the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Id.* at 938. Then-Judge Kennedy, wrote for the court that four factors should guide the exercise of this discretion: 1) the potential for confusion of the jury that may have resulted from an erroneous submission of a particular claim; 2) whether the defenses of the losing party applied to the count upon which the verdict is being sustained; 3) the strength of the evidence supporting the count being relied upon to sustain the verdict; and 4) the extent to which the same disputed issues of fact

apply to one or more of the theories in question. *Id.* at 938-39.

Although the Ninth Circuit cases have not been consistent in applying *Traver*, one commentator has concluded that in "in practice they seemed to be functionally equivalent" to the harmless error analysis followed in other circuits. Ryan Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the Baldwin Principle*, 4 J. APP. PRAC. AND PROCESS 89, 101 (2002).

Some judges have strongly criticized *Traver* and the harmless error exception as inconsistent with the *per se* rule of reversal laid down by this Court in *Baldwin* and its progeny. See *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 136-37 (3d Cir. 1999) (Cowen, J., concurring in part and dissenting in part); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790 (9th Cir. 1990) (Kozinsky, J., dissenting).

On the other hand, courts have explained that the exception is consistent with a narrow interpretation of *Baldwin*. That is, reversal is necessary where it is indeed impossible to know from the general verdict the basis for the jury's decision. Still, provision is made, under this approach, to allow the verdict winner to prove to a reasonable certainty, that the jury could not have been influenced by the legal error. See, e.g., *American Airlines, Inc. v. United States*, 418 F.2d 180, 195 (5th Cir. 1969); see generally, Phair, *supra*, at 101, 108-09. Whether such an exception is permissible merits this Court's attention as well.

However phrased, the harmless error exception clearly imposes a considerable burden on

the party seeking affirmance. One commentator writing in 2002 counted only four affirmances on this ground over the course of about 30 years. Phair, *supra*, at 111 n.89.³ The position espoused by the court below in this case, presuming that the jury was not influenced by legal error, would make such affirmances the rule, rather than the exception.

C. The Minority Position of the Seventh and Eighth Circuits.

The position adopted by the Eighth Circuit in this case most closely resembles that adopted by the Seventh in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981). McGrath, the former vice-president of an electronics wholesaler who was not named president after the company was acquired by Zenith, brought suit alleging breach of contract, common law fraud, and violation of federal securities laws. On appeal following a general verdict in McGrath's favor, the court emphasized that "defendants' burden is a heavy one in seeking reversal of the judgment or remand for a new trial." *Id.* at 464. To triumph on appeal, the court stated, defendants must show not only prejudicial error affecting one of plaintiff's claims, but "defendants must show that under none of the three rationales was plaintiff entitled to the award." *Id.*

The court determined that McGrath's common law fraud claim was properly submitted to the jury. However,

³ They are: *Hurley, supra*; *Bruneau, supra*; *Henderson v. Winston*, 59 F.3d 166 (4th Cir. 1995); and *Braun v. Flynt, supra*. Counsel has identified one additional such affirmance, *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001).

Even if we assume *arguendo* that the instruction relating to the securities violation was erroneous it cannot be shown, other than on the basis of speculation or conjecture, to have affected the jury's decision, there being a totally adequate independent theory upon which the verdict may have rested.

Id. at 472. The court added, foreshadowing the Eighth Circuit's own rationale, "It would be an abuse of our powers of appellate review to upset the judgment below on the basis of mere speculation." *Id.*

The minority rule has been strongly criticized. Judge Kozinski sharply rejected *McGrath* as contrary to this Court's settled rule:

The Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that *none* of the plaintiff's theories will support the general verdict. . . . For reasons explained in *Baldwin*, this rule makes no sense at all, never mind that it contravenes Supreme Court authority.

Kern v. Levelor Lorentzen, Inc., 899 F.2d 772, 790-91 (9th Cir. 1990) (emphasis in original) (Kozinski, J., dissenting). See also Elizabeth Cain Moore, *General Verdicts in Multi-Claim Litigation*, 21 MEM. ST. U.L. REV. 705, 729 (1991) (*McGrath* "goes even farther than a discretionary harmless error analysis and directly conflicts with United States Supreme Court

precedent."); Phair, *supra*, at 121 ("The *McGrath* decision thus turned the *Baldwin* principle on its head.")

Like *McGrath*, the Eighth Circuit's decision in this case contradicts the general verdict rule established by this Court and followed by the great majority of federal courts of appeal. This Court should grant the Petition for a Writ of Certiorari, both to vindicate its established rule and to clarify for the courts its application.

III. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN CIVIL ACTIONS IN FEDERAL COURT.

Application of the correct standard for appellate review of general verdicts is a matter of great practical importance to a large number of litigants in a wide variety of civil cases. "Most jury-tried civil cases in federal courts are resolved, and always have been, by a general verdict." 9A Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 2501 (2005 Supp.). It is fair to state that a great many such cases involve multiple claims or defenses that set the stage for application of the Court's general verdict rule.

That rule applies to all manner of civil actions under federal statutes as well as to claims under state law in diversity cases. It does not discriminate between plaintiffs and defendants. To all parties, the rule is certainly of great import. It determines whether his or her substantial rights will be vindicated, or whether, under the Eighth Circuit's view, remedy for legal error at trial lies out of reach on appeal.

The lower court's view foreshadows an erosion of the quality of justice in the federal courts. Errors of law will become embedded in judgments, insulated by an insurmountable presumption of harmlessness. Moreover, that view hampers the careful development of the law. It invites courts to choose the path taken by the court below, finding it unnecessary to declare what the law is in favor of stating that any error could not be grounds for reversal. Review by this Court is needed to reaffirm and clarify the responsibility of the appellate courts.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals,
Eighth Circuit.

REGIONS BANK, Guardian of the Estate of
Kimberly Renea Smith,
Appellant,
v.
BMW NORTH AMERICA, INC.; BMW AG,
Appellees.
No. 04-2273.

Submitted: Jan. 12, 2005.

Filed: May 9, 2005.

Rehearing and Rehearing En Banc Denied June 24,
2005.

E. Gregory Wallace, argued, Buies Creek, North Carolina (Sandy S. McMath on the brief), for appellant.

Colvin G. Norwood, Jr., argued, New Orleans, Louisiana (Margaret Diamond and M. Stephen Bingham on the brief), for appellee.

Before LOKEN, Chief Judge, HANSEN and MURPHY, Circuit Judges.

HANSEN, Circuit Judge.

Kimberly Renea Smith was rendered a quadriplegic after she lost control of her BMW 318i on a downhill curve. The car struck the hillside, rolled over onto its roof, and eventually came to rest. The driver's-side frontal-impact airbag did not deploy. Smith [FN1] sued BMW, alleging that the airbag's failure to deploy was the result of a defect or BMW's

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negligence, that she suffered enhanced injuries during the collision with the hillside as a consequence of the airbag's failure to deploy, and that BMW was liable for these enhanced injuries. After a trial, a jury rendered a general verdict in favor of BMW, and the district court [FN2] entered judgment on the jury verdict.

FN1. In this opinion, we will refer to Smith and Regions Bank, the legal guardian of her estate, collectively as "Smith." We will refer to BMW North America and BMW AG collectively as "BMW."

FN2. The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

Smith appeals, arguing that the district court abused its discretion by permitting BMW to introduce evidence at trial relating to her blood alcohol level at the time of the car accident. For the reasons discussed below, we affirm.

I.

Prior to trial, Smith moved in limine to exclude evidence relating to her blood alcohol content at the time of the car accident. (D. Ct. Docket # 245.) After a hearing, the district court denied Smith's motion, concluding that the evidence was relevant to BMW's theory "that it was the collision itself and the subsequent rollover of the vehicle that caused the injury." (Mot. Hrg Tr. at 28-30.)

At trial, the parties stipulated that when Smith's blood was tested approximately two hours after the accident, her blood serum alcohol level was . 136

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percent. (Trial Tr. at 98.) BMW called Dr. Henry Simmons to testify. He noted that Smith's blood was tested a second time approximately four hours after the accident, and her blood serum alcohol level at that time was .096 percent. Based on this data, he estimated that Smith's blood serum alcohol level was .176 percent at the time of the accident. Dr. Simmons described a typical person with that level of alcohol in her blood as being emotionally unstable, having decreased inhibitions, having reduced ability to make critical judgments, having impaired memory, having impaired ability to understand information, and having decreased response time and muscular coordination. He opined that a typical person would have to drink at least four-and-a-third twelve-ounce cans of beer or six-and-a-half ounces of eighty-proof liquor to achieve that blood alcohol level. (*Id.* at 961-75.)

Dr. Simmons was the only defense witness who testified about Smith's blood alcohol content. BMW's remaining witnesses, two engineers and a doctor, testified about the car's impact with the hillside and subsequent rollover, the design of the car's airbag, and how Smith's injuries occurred.

At the jury instructions conference, Smith stated that she had no objections to the instructions or verdict forms prepared by the district court. (*Id.* at 1393.) In relevant part, the district court instructed the jury as follows.

The jury was instructed that Smith had asserted two separate grounds for recovery of damages. First, she should recover if she proved that BMW supplied the airbag in her car in a defective condition which rendered it unreasonably dangerous, and that the

defective condition was a proximate cause of her injuries. Second, Smith could recover if she proved that BMW was negligent and that its negligence was a proximate cause of her injuries. Proximate cause was defined for the jury, and the jury was instructed that there could be more than one proximate cause of Smith's injuries. (*Id.* at 1415-16, 1418-19.)

The district court instructed the jury that, if it determined that Smith was without fault for the proximate cause of her injuries, she was entitled to recover damages in full. If the jury determined that both Smith and BMW were at fault, but that Smith's fault was less than BMW's fault, Smith was entitled to recover reduced damages. If the jury determined that BMW was without fault, or that Smith's fault was greater than or equal to BMW's fault, Smith was not entitled to recover any damages. (*Id.* at 1422.)

Regarding intoxication, the district court instructed the jury that it was unlawful under Arkansas law for a driver with a blood alcohol level of 10 percent or greater to operate a motor vehicle. A violation of this statute did not necessarily constitute negligence, the jury was instructed, but did constitute evidence of negligence to be considered along with all of the other evidence in the case. An intoxicated person is held to the same standard of care as a sober person, the jury was told, and intoxication does not excuse the failure to exercise ordinary care. (*Id.* at 1417-18.)

Finally, the district court explained to the jury how it should fill out the general verdict forms. If the jury found for Smith under either of her two theories of liability, then it should return the form reading, "We, the jury, find for the plaintiff and fix her damages at

___ dollars." If the jury found that Smith had failed to prove either of her two theories of liability, or that her fault was equal to or greater than BMW's fault, then it should return the form reading, "We, the jury, find for the defendants." (*Id.* at 1424.) The jury returned the latter verdict form. (Appellees' App. at A.)

II.

Smith argues that she is entitled to a new trial because the district court erred by admitting evidence relating to her blood alcohol level at the time of the accident. We will only grant a new trial if the district court clearly abused its discretion by admitting the evidence, which requires a showing that the error prejudicially influenced the outcome of the trial. *See Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1080 (8th Cir.2000). In this case, as in *Lovett*, we do not reach the question whether the district court properly applied Arkansas law by admitting the evidence because Smith has failed to prove that the outcome of the trial was prejudiced by the admission of the evidence. *See id.*

To determine whether evidence of Smith's blood alcohol level prejudicially influenced the outcome of the trial, we look to the jury's verdict. *See id.* As noted above, the verdict reads in its entirety: "We, the jury, find for the defendants."

"We have no way of determining from this general verdict why the jury found [BMW] not liable." *Id.* It is possible, as Smith argues, that the jury reached this verdict by assigning fault to Smith on the basis of her alcohol consumption, comparing her fault to BMW's fault, and concluding that Smith's fault was equal to or greater than BMW's fault. However,

there are two other possibilities that are at least as likely, neither of which rests on the evidence of Smith's blood alcohol content. First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover-when deployment of the airbag would not have helped, as Smith conceded-rather than during the impact of the car into the hillside.

Evidence of Smith's blood alcohol level was by no means the centerpiece of BMW's defense. In the eight-day jury trial, Dr. Simmons' entire time on the witness stand was approximately one hour and fifteen minutes. "[T]he case was submitted on a general verdict form, so we can only speculate whether [Smith] was prejudiced. Speculation, however, is not a sufficient basis for finding a plaintiff's substantial rights were affected, and we will not set aside the jury's verdict in this case." *Id.* Accordingly, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2273

Regions Bank,	*	
Guardian of the Estate	*	
of Kimberly Renea	*	
Smith,	*	Order Denying
	*	Petition for
Appellant,	*	Rehearing and for
	*	Rehearing En Banc
vs.	*	
BMW North America,	*	
Inc.; BMW, AG,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied.

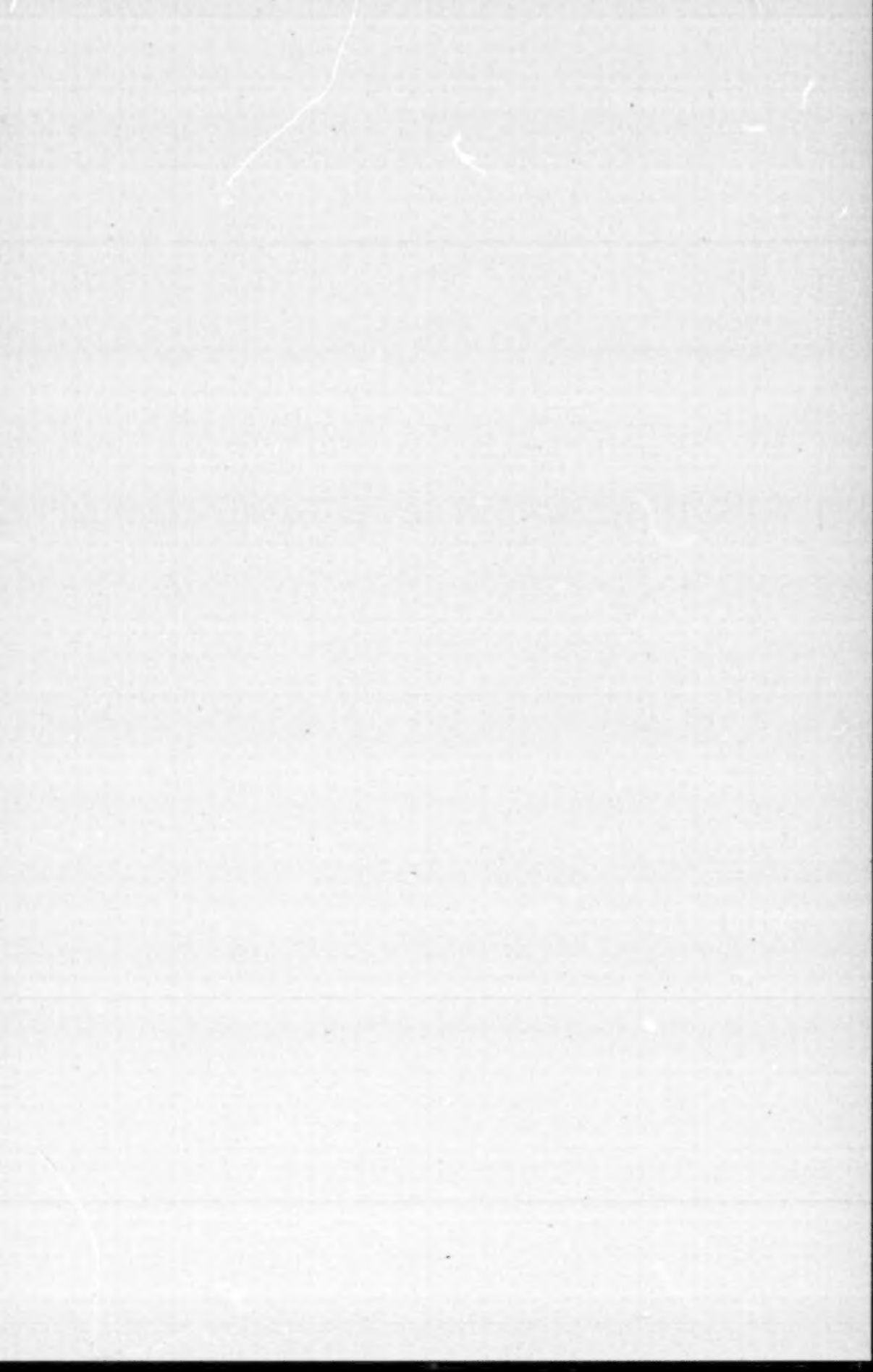
The petition for rehearing by the panel is also
denied.

(5128-010199)

June 24, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit



No. 05-375

Supreme Court U.S.

FILED

OCT 21 2005

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

**REGIONS BANK, GUARDIAN OF THE
ESTATE OF KIMBERLY RENE SMITH,**

Petitioner,

v.

BMW NORTH AMERICA, INC., AND BMW AG,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

The Question posed by the Petition does not take into account significant procedural events and findings made by the Court of Appeals, which show that this case does not squarely present the issue Petitioner raises and is not appropriate for review by this Court. Respondents suggest the following as a more complete and accurate statement of the Question:

Whether this Court should presume error in the trial court's resolution of a state law issue concerning the admissibility of evidence supporting an affirmative defense of comparative fault in order to require the Court of Appeals to examine a general verdict in favor of Respondents and make a determination of the jury's specific findings on the issues underlying that verdict, even though

- the Court of Appeals did not find legal error;
- Petitioner agreed to submit the case on a general verdict form knowing such a verdict would preclude a determination on appeal that the jury reached the issue of Smith's comparative fault;
- Petitioner did not object to the jury instruction that driving while intoxicated could constitute comparative fault under Arkansas law in the circumstances of this case;
- Petitioner did not assert on appeal that the evidence was insufficient to support the verdict for BMW on the merits of the products liability claim; therefore, the Court of Appeals could not find that Petitioner was prejudiced by the alleged error; and

QUESTION PRESENTED - Continued

- the Court of Appeals concluded that there were two independent factual bases for the jury's rejection of Petitioner's claim, neither of which required consideration of the allegedly tainted evidence, and each of which was at least as likely a reason for the verdict as a determination that Smith's fault was equal or greater than Respondents' fault.

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Respondents, BMW of North America, Inc., and BMW AG, disclose the following corporate affiliations:

BMW AG is the parent company. No publicly held company owns 10 percent or more of the stock of BMW AG. BMW of North America, LLC, successor to BMW of North America, Inc., is a wholly owned subsidiary of BMW US Holding Corp., which in turn, is a wholly owned subsidiary of BMW AG.

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STATEMENT OF THE CASE

Kimberly Smith sustained a severe cervical injury in a single-vehicle accident that occurred about 4 a.m. on August 24, 1997, when she lost control of her 1994 BMW 318i, which ran off the road into the side of a hill and rolled over several times along the edge of the pavement. Smith sued the distributor and manufacturer of her vehicle, Respondents, BMW of North America, Inc., and BMW AG (collectively "BMW"), in federal district court, claiming that her injury was caused by a malfunction of the driver's air bag, which she contended should have deployed when the vehicle struck the hillside. This alleged malfunction was Smith's only claim of defect under the Arkansas Product Liability Act, Ark. Code Ann. § 16-116-101 *et seq.*, and the only basis for alleging that BMW negligently designed the 318i. Smith did not claim that the design or manufacture of the vehicle caused or contributed to the accident: the accident was caused entirely by Smith's inability to maintain control of her vehicle due to intoxication.

BMW's answer denied liability and pleaded the affirmative defense of comparative fault under the Arkansas Comparative Fault Statute, Ark. Code Ann. § 16-64-122, which permits a claimant to recover only if his or her fault is "of a lesser degree" than the fault of the defendant. The statute broadly defines "fault" as "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party. . . ." BMW contended that, even if it were found at fault for the design of the vehicle, Smith's greater fault in causing the accident barred recovery.

BMW contended that this defense permitted the introduction of evidence of Smith's stipulated blood alcohol content, as interpreted by a toxicologist, as proof of comparative fault under Arkansas law. Petitioner moved to exclude the evidence.¹ Judge James M. Moody denied the motion: "I'm going to permit the evidence of the blood alcohol content and also the testimony of Dr. Simmons (the toxicologist) as to the effect of that amount of alcohol on a driver such as Ms. Smith and as to whether or not it produced the collision which eventually led to her injuries." The district court limited any potential for unfair prejudice to Petitioner by allowing Petitioner to strike for cause the only prospective juror who indicated that he would be unable to find in Petitioner's favor because of the evidence of Smith's intoxication.

At trial, as permitted by the district court, BMW introduced the opinion of an expert toxicologist who testified that at the time of the accident Smith's blood alcohol content was .176 percent. He concluded that such a blood alcohol level would diminish a person's ability to operate and control a motor vehicle. The alcohol evidence permitted by the district court was brief and to the point. In eight days of trial, the toxicologist was the only witness who gave substantive evidence concerning Smith's alcohol consumption and its effects.

Apart from this relatively brief testimony, the subject of Smith's intoxication was raised almost entirely in

¹ Smith previously had filed a similar motion when the case was set for trial before Judge William Wilson, who later was recused when Regions Bank substituted as plaintiff. Judge Wilson, an author of the Arkansas comparative fault statute, ruled the alcohol evidence admissible.

Petitioner's counsel's questioning and argument.³ Petitioner's counsel seemingly invited prejudice against his client. While cross examining the toxicologist, Petitioner's counsel pressed for details concerning Smith's tolerance for alcohol "or anything like that."⁴ Judge Moody interrupted the questioning and asked Petitioner's attorney why he was attempting to present such evidence. The judge concluded that he did not believe that the witness intended to violate the *in limine* order concerning admission of alcohol evidence, and Petitioner's counsel chose not to ask for a limiting instruction or other remedy.⁴

Petitioner did not object to the jury instructions on comparative fault and the relevance of Smith's blood alcohol content. Therefore, the judge charged the jury without objection as to the "rules of the road" to be used in determining whether Smith was negligent and then instructed, under the Arkansas Comparative Fault Statute, that

If you should find that the injuries were proximately caused by the fault of both Kimberly Smith and the defendants, then you must compare the percentages of their fault. And if the

³ Petitioner's counsel's references to alcohol are similar to those of the attorney whose objection to alcohol evidence was rejected in *Miles v. General Mtrs. Corp.*, 262 F.3d 720, 723 (8 Cir. 2001) ("Miles himself first raised the issue of alcohol consumption in *voir dire*, in his opening statement, and on direct examination of several witnesses in his case in chief.").

⁴ The Petition quotes the toxicologist's testimony that Smith was a "problem drinker," a statement that was elicited by Petitioner's pointed cross examination.

⁴ Petitioner's counsel's reaction to Judge Moody's caution was "I will just roll with it." (Transcript p. 994)

fault of Kimberly Smith was of less degree than the fault of defendants, then Regions Bank, as her guardian, is entitled to recover any damages sustained as a result of the occurrence, after you have reduced them in proportion to the degree of the fault of Kimberly Smith.

On the other hand, if the defendants were not at fault, or if the fault of Kimberly Smith was equal to or greater than the fault of the defendants, then Regions Bank, as the guardian of the estate of Kimberly Smith, is not entitled to recover any damages.

Like his questioning of the toxicologist, Petitioner's counsel's closing argument invited prejudice⁸ by focusing not only on Smith's drinking, but by explicitly suggesting that she might be guilty of other completely irrelevant misconduct that had not been even implied by the evidence:

As the Judge said, negligence that is a cause, a proximate cause of her own injuries. Remember, we went through this on *voir dire*. . . . You remember, we've had half a dozen people⁹ get up and answer the question honestly. "No matter what the evidence shows, even if it shows her drinking didn't have anything to do with the air bag not working, I still couldn't find for her because I have this real strong philosophical belief,

⁸ BMW submits that this record precludes a reasoned analysis of whether the alleged error in the admission of the alcohol evidence prejudiced the jury against Smith because any prejudice easily could have been caused by Petitioner's counsel, not by the evidence.

⁹ One prospective juror – not half a dozen – indicated that the alcohol evidence would influence his decision. He did *not* state his views using the inflammatory language Petitioner's counsel attributed to him.

if you're drinking, you deserve what you get, and out you go." The rest of you answered honestly that that would not influence you, that you would decide the case on its facts. . . . When you sue BMW, or any of these big corporations, they know how to use the discovery that you have to honestly respond to. Interrogatories, they're called. Formal questions. And if you leave something out, and you swear it's all there, that's perjury. You go to jail. And don't think they don't troll these documents to check against lies that were told so everybody has to tell the truth. You want to do it anyway. So you think about, in your background, all the things that you've forgotten, that you've atoned for, that you've been to church for, that are part of the past that all of us have, you get into that condition (pointing), and you have to come to court - because you don't have any other alternative. They hire paralegals to go out, and they dig and they dig, and they take that information and they put it all together. Let me tell you something. If there was one instance in her life of drug use, or possession of methamphetamines, of cocaine, of all the bad stuff, the monsters that lurk in the shadows, any conviction for any felony, DWI, any conviction, they'd have it in here. There is none. They don't have it. And they have looked. Don't think they haven't spent hundreds of hours trying to dig up all the dirt on her they can. And they don't have it. But they had this toxicologist whose testimony was if you drink, you're not going to be able to control your vehicle as well as when you're sober. We know that.

BMW's closing contrasts starkly with Petitioner's florid argument. BMW's counsel addressed the comparative fault issue as follows:

Finally, I have to say something about the alcohol issue. I don't know why anyone is suggesting that there is some sort of attempt at character assassination of Ms. Smith. Has anyone from BMW said that? I don't think so. We reported a fact that wasn't a surprise because it was on the police report. .136. This is a highly significant fact which can explain everything that happened in this accident. It was reasonable, appropriate, in fact, it would be wrong not to point this out. You have to decide its consequences.

These sentences – nine lines of transcript – are the entirety of BMW's references to Smith's fault in a 25-page closing argument that focused almost entirely on the technical evidence concerning the design and performance of the air bag system in Smith's vehicle.

Petitioner agreed to the use of the general verdict form. The district court presented the jurors with two forms, allowing the jury only to "find for the defendants" or to "find for the plaintiff." When asked during the charge conference whether Petitioner had objections, counsel replied, "No objections, Judge, to the instructions or the verdict form." The jury returned the general verdict for defendants.

On appeal to the Eighth Circuit, Petitioner assigned error only in the admission of Smith's intoxication as evidence of comparative fault. Petitioner's brief stated as the sole issue, "Whether the district court properly admitted evidence of Kimberly Smith's blood alcohol content and its effect as proof of comparative fault in a crashworthiness case." Petitioner did not assign any error in the jury's rejection of the merits of the claim that BMW's air bag system malfunctioned and caused Smith's injury.

BMW argued and presented authorities on appeal supporting the conclusion that Arkansas law and policy strongly support the admission of the evidence of Smith's intoxication as proof of comparative fault.⁷ The thrust of BMW's arguments to the Eighth Circuit, however, was that the air bag system in Smith's vehicle performed as designed in the accident and that she was injured during the vehicle's rollover, an injury that the air bag could not have prevented. BMW demonstrated that the evidence at trial supported the finding, which Petitioner did not challenge, that the vehicle was not defective under the Arkansas Product Liability Act and that BMW was not negligent in designing the vehicle. The record, BMW contended, overwhelmingly supported the verdict in BMW's favor without a consideration of Smith's comparative fault.

The decision of the Court of Appeals avoided the state law comparative fault issue. The court found that the record and the general verdict did not require consideration of the issue Petitioner raised on appeal. Rejecting Petitioner's contention that the verdict was based on the purported error in admitting the alcohol evidence, Judge Hansen's opinion found it "just as likely" that the jury reached one of two other reasonable conclusions on the merits of the products liability claim:

⁷ *Miles v. General Mtrs.*, 262 F.3d 720; *Keltner v. Ford Mtr. Co.*, 748 F.2d 1265 (8 Cir. 1984); Restatement (Third) of Torts, Products Liability § 16 cmt. f (1998); William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, The Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 Okla. L. Rev. 201, 275 (Summer 1994).

- a) The air bags properly did not deploy in the initial stages of the accident; or
- b) The neck injury was unrelated to the air bag and occurred later in the accident when the vehicle rolled over.

The court, therefore, refused to decide the evidentiary question and unanimously affirmed the judgment for BMW.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Consideration of Petitioner's issue would require the Court implicitly to decide an issue of state law.

Petitioner asks the Court to remand this case to the Court of Appeals based on a *presumption* of legal error in the district court's decision on a question of state law.⁸ Certiorari should not be granted for the purpose of deciding questions of state law. Whether the Arkansas Supreme Court would hold that a driver's comparative fault in causing an accident is admissible under the Arkansas Comparative Fault Statute is not an issue that should be decided in the first instance by this Court. Petitioner does not make so bold an assertion, but the Question Presented requires a conclusion that the admission of evidence of comparative fault was error. Yet the Court of Appeals (much less the trial court) has made no such ruling. Only

⁸ Indeed, the Petition states the question as whether the judgment "may be affirmed despite *legal error* at trial where it cannot be determined whether the jury relied upon the *legal error* in rendering its verdict." [Petition at i (emphasis supplied)]

after presuming that the record contains such a ruling could the Petitioner ask the Court to decide whether the Court of Appeals should have affirmed the judgment based on the general verdict.

The issue Petitioner seeks to raise, *viz.* how a Court of Appeals should analyze a general verdict tainted with legal error, is simply not ripe for consideration on this record. Whether such a question would be worthy of the Court's attention in a case in which the Court of Appeals actually found legal error in a ruling by the district court, but yet affirmed a general verdict, is a question for another day. This case presents no such issue.

II. Petitioner waived objection to the general verdict form; therefore, the Court of Appeals properly refused to consider the alleged evidentiary error.

Petitioner seeks remand by complaining that the Court of Appeals erroneously found that the general verdict did not support consideration of the state law issue Petitioner raised on appeal. This result is the direct, necessary consequence of decisions that were part of Petitioner's deliberate litigation strategy. The record shows that Petitioner agreed to submit the case on a general verdict form, Petitioner did not object to either the verdict form or the jury instructions on driving while intoxicated and comparative fault, and Petitioner did not appeal the sufficiency of the evidence that supports the jury's verdict even without consideration of the allegedly improper evidence.

On this record, the Court of Appeals appropriately avoided deciding the Arkansas comparative fault issue

Petitioner raised on appeal by finding it "at least as likely" that the jury found for BMW without considering the evidence of Smith's comparative fault. The Court of Appeals correctly recognized that Petitioner's claim easily could have been rejected on the merits of the products liability issues of defect and negligence – a basis that Petitioner did not appeal. This case, therefore, does not merit consideration by this Court.

The record does not support application of the principles of *Maryland v. Baldwin*, 112 U.S. 490 (1884), to the general verdict that rejected Petitioner's claim against BMW. *Baldwin* does not change the rule that an appellant challenging the admission of evidence at trial bears the burden of demonstrating that the alleged error affected substantial rights. Fed. R. Evid. 103(a)(1); Fed. R. Civ. P. 61; 28 U.S.C. § 2111; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61"). "[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1156 (10 Cir. 1985). See also *Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8 Cir. 2000) ("An abuse of discretion occurs when the error prejudicially influences the outcome of the case, . . . and the burden of showing prejudice rests on the party asserting it.").

Under these authorities, Petitioner's appeal of the district court's evidentiary ruling required a showing that the comparative fault evidence was admitted in error and that the jury reached an issue that required consideration

of the evidence of Smith's comparative fault. Because Petitioner failed to make this showing, the Court of Appeals was not required to consider the issue raised on appeal.

Petitioner should not be heard to complain of the consequences of its own strategy, which developed over years of litigation. The evidence of Smith's conduct in causing the accident was an issue from the very inception of this suit. BMW pleaded comparative fault in its answer. The trial judge ruled before trial, agreeing with his predecessor judge, that a qualified toxicologist should be permitted to testify concerning Smith's intoxication and its effects. Following this testimony, Petitioner did not object to the court's instructions to the jury that if BMW were found at fault, Arkansas law required a comparison of BMW's fault and Smith's fault, if any, and that the Arkansas comparative fault statute barred recovery if Smith's fault was "equal or greater in degree than any fault chargeable" to BMW. Petitioner also did not object to the general verdict, although in the event of a verdict for BMW, the use of this verdict form might preclude a determination of the specific basis for that verdict.

No injustice has been done because Petitioner could have avoided the verdict that it now complains is inscrutable. Under Federal Rule 49(b), Petitioner could have asked the court to submit a general verdict accompanied by interrogatories that would have revealed the jury's specific findings on the issues and facilitated examination of those findings on appeal. However, for reasons known only to Petitioner and Petitioner's counsel, Petitioner agreed to the use of the general verdict form, making no objection to the form of verdict or to the jury instructions on drinking and driving and comparative fault. Petitioner chose not to exercise the right to request specific findings

from the jury. Had Petitioner made such a request and made and preserved an objection to the general verdict, then the Court of Appeals might have been obliged to consider the underlying evidentiary issue. However, Petitioner failed to meet these requirements.

Petitioner further thwarted a favorable appellate ruling by failing to challenge BMW's evidence that the air bag system in the 318i performed properly in Smith's accident. The jury was instructed that a verdict for Petitioner required two findings: the jury was required first to accept Petitioner's evidence of BMW's fault and then to weigh that fault against Smith's fault, if any, and to find that BMW's fault was greater. Petitioner's appeal addressed only the second finding. Petitioner's failure to argue on appeal that the evidence established BMW's fault precluded reversal of the verdict. Because Petitioner's appeal did not raise an issue as to the design or performance of the air bag, the Court of Appeals could not find in Petitioner's favor on this issue. Therefore, even if the comparative fault evidence was admitted in error as Petitioner argued, affirmance was required because Petitioner's appeal did not allow the court to find that the evidence supported a finding of fault chargeable to BMW.

Petitioner's acquiescence in the use of a general verdict – coupled with Petitioner's failures to object to jury instructions and to appeal the rejection of its claim on the merits – precluded a showing of reversible error.

III. The Eighth Circuit found that any error in admitting the comparative fault evidence was harmless because the jury reasonably could have found for BMW without considering that evidence.

The Petition asks the Court to remand based on a presumption that the jury considered the alcohol evidence. The opinion of the Court of Appeals demonstrates that this presumption is not justified. The court explicitly recognized that, although the jury might have weighed the parties' comparative fault in reaching its verdict, it is "likely" that the case was decided on the merits of Petitioner's products liability claim, a basis that Petitioner did not appeal. Judge Hansen's opinion found two other possibilities "at least as likely" as a decision based on comparative fault. As BMW argued on appeal and the Eighth Circuit found,

First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover – when deployment of the airbag would not have helped, as Smith conceded – rather than during the impact of the car into the hillside.

[Pet. App. 6a] The Court of Appeals thus expressly rejected the presumption Petitioner seeks: a presumption that the jury reached a decision based on the alcohol evidence. Such a presumption would, therefore, be inappropriate, and remand would be futile because the Court of Appeals

has found that the jury likely did not consider the challenged evidence.

IV. Neither *Baldwin* nor its progeny requires a different result in this case.

The plaintiff who appealed in *Baldwin* demonstrated an error that affected substantial rights because the challenged evidence was relevant to an essential element of his claim, i.e., his status as a beneficiary of the estate whose administrator he had sued for malfeasance. The jury necessarily considered the improper evidence – hearsay that impeached a witness on the issue of the marriage of plaintiff's parents – because it was directed to a threshold element of plaintiff's case. The jury had to consider the evidence and find that plaintiff was an heir before the defendant was required to prove any of its defenses, which pleaded generally that plaintiff had received everything to which he was entitled as an heir. In contrast, the challenged evidence in this case – proof of Smith's comparative fault – is not directed to a threshold element of the plaintiff's case, but to an affirmative defense that the jury was instructed to consider only if it first found against the defendant on the merits of the products liability claim. This critical distinction removes the present case from the *Baldwin* "general verdict" rule.

This Court's case law cited at pages 7-8 of the Petition as illustrating the proper application of *Baldwin* is likewise inapposite. Each of the cases Petitioner cites involved a general verdict for a plaintiff on a multi-count claim, and a defendant's appeal assigning error that tainted fewer than all counts. In each case, the jurors necessarily considered the allegedly improper evidence, instruction, or

legal theory – even though it may or may not have been the basis for the general verdict. In contrast, in this case, the general verdict was for the defendant, and the plaintiff's appeal assigned an error in the admission of evidence that was relevant only to an affirmative defense that the jury was instructed to consider only after finding the defendant at fault. Assuming the jury followed its instructions concerning the evidence and issues,⁹ and because the plaintiff did not assign error in the jury's rejection of the merits of the products liability claim, the Court of Appeals properly found that the jury could have rejected plaintiff's claim on the merits without reaching the affirmative defense or considering the comparative fault evidence relevant only to that defense.

None of the cases cited in the Petition as following the *Baldwin* principle present the peculiar circumstances of this case: an appellant who orchestrated a scenario on appeal that precluded a showing of reversible error. Even accepting the Petition's contention that courts have treated general verdicts based on alleged error inconsistently, this case is not an appropriate case for resolving those inconsistencies. If this case is an anomaly, as the Petition suggests, it is an anomaly only because Petitioner chose to make it so by constructing a record that allowed the Court of Appeals to affirm without deciding an issue that the jury "likely" did not reach.

⁹ It must be presumed that the jury followed the instructions. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8 Cir. 2004).

V. Petitioner asks the Court to destroy the utility of the general verdict form by presuming prejudicial error.

Having forfeited the ability to demonstrate the basis for the jury's verdict, Petitioner seeks a presumption that the jury decided for BMW based on the evidence of Smith's drinking and driving. Neither *Baldwin*, statute, case law, nor court rule requires the result Petitioner seeks: "a presumption that a prejudicial error affected the decision of the jury." See Petition, p. 9. A general verdict does not invariably result in a presumption of prejudice from every error assigned on appeal. If such were the law, courts and litigants long ago would have abandoned the general verdict.

As the Petition recognizes, "[m]ost jury-tried civil cases in federal courts are resolved and always have been by a general verdict in which the jury finds for the plaintiff or for the defendant." Wright, Charles A. & Miller, Arthur R., *Federal Practice and Procedure* § 2501 (1995). Under Federal Rule 49, the decision whether to submit a case using a general verdict, a special verdict, or a general verdict with interrogatories is within the broad discretion of the trial judge. *Id.* § 2505. As in this case, the parties may agree to any form of verdict that is authorized under Rule 49 and permitted by the trial judge.

Each verdict form permitted under Rule 49 has advantages and disadvantages. Consequently, in many cases, the choice of verdict form is a significant strategic decision for the litigants and a point of contention between opposing parties. The appellate proceedings in this case reveal one potential disadvantage of the general verdict to a plaintiff who seeks review of an alleged error that relates to only one defense theory, here, the affirmative

defense of comparative fault. The manifestation of this disadvantage does not mean, however, that the Court of Appeals must invariably accept an appellant's invitation to delve into the basis for the general verdict or to presume legal error – particularly when the appellant did not object to the use of the general verdict form. Presumably, Petitioner acquiesced in the submission of the case on a general verdict because that verdict form held potential benefits for Petitioner. Petitioner chose and accepted those benefits along with the risks – including the risk that materialized when Petitioner constructed a record and an appellate argument that precluded reversal.

Petitioner would have this Court impose an unjustified presumption that every general verdict that is appealed is the result of prejudicial error. Such a presumption ignores both logic and the myriad variation of issues and parties that allows the *Baldwin* reasoning in some cases but not in others. Such a presumption of error also is contrary to the principles Justice Rehnquist described in *McDonough Power Equipment*,

We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citadels of technicality." . . . The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

464 U.S. at 553. In *McDonough*, the respondent had obtained a reversal and a new trial on appeal based on a juror's failure to answer a question on *voir dire*. The Court reversed, holding that the respondent had failed to sustain

an appellant's heavy burden to show prejudicial error on appeal.

To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination. Whatever the merits of the Court of Appeals' standard in a world which would redo and reconstruct what had gone before upon any evidence of abstract imperfection, we think it is contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111.

Id. at 555-56. This reasoned standard, and not the presumption of a prejudicial error, governs the federal courts.

VI. The Court of Appeals appropriately avoided a state law question by finding another basis for the jury's verdict.

Petitioner would require the Court of Appeals to go to extraordinary lengths – presume prejudicial error and review the sufficiency of evidence the appellant did not address – in order to decide an issue of Arkansas law and public policy. The federal courts should avoid such decisions. The Eighth Circuit properly found an evidentiary basis for the jury's general verdict without unnecessarily deciding an issue of Arkansas law. Even if the issue of the admissibility of Smith's comparative fault was a novel one

— and BMW contended it was not¹⁰ — resolution of a question of Arkansas law and public policy would have been contrary to the rule that the federal courts should avoid the determination of legal questions that “might be more appropriately left to settlement in state court litigation. . . .” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 fn. 5 (1966). See also *Combs v. International Ins. Co.*, 354 F.3d 568, 577 (6 Cir. 2004) (“This Court’s proper reluctance to speculate on any trends of state law applies with special force to a plaintiff in a diversity case, like this one, who has chosen to litigate his state law claim in federal court.”); *Great Cent. Ins. Co. v. Insurance Services Office, Inc.*, 74 F.3d 778, 786 (7 Cir. 1996) (“a plaintiff who needs a common law departure or innovation to win should bring his suit in state court rather than in federal court”); *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1217 (5 Cir. 1985) (“we remain mindful of our role in the system; it is not for us to adopt innovative theories of recovery or defense for Texas law. . . .”).

It was not necessary for the Eighth Circuit to weigh in on the issue of the admissibility of the comparative fault evidence under Arkansas law — at the request of a litigant who chose to litigate in federal court. The court’s refusal to do so was an appropriate exercise of its jurisdiction.

¹⁰ See fn. 7 above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

REGIONS BANK, GUARDIAN OF THE ESTATE OF
KIMBERLY RENE SMITH

Petitioner,

v.

BMW NORTH AMERICA, INC. AND BMW AG,

Respondents.

**On Petition for a Writ of Certiorari to the
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for the Eighth Circuit**

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REPLY BRIEF OF PETITIONER

**THE PROCEDURAL ASPECTS OF THIS
CASE PRESENT NO IMPEDIMENT TO
REVIEW BY THIS COURT.**

Respondent does not dispute the fact that the Question Presented by Petitioner is an important one that merits this Court's attention and which has generated a sharp split in the circuits. Instead, Respondent asserts that "significant procedural events and findings" make this case not appropriate for review. Opp. at i. In fact, Respondent's objections underscore the importance of this case as an appropriate vehicle to resolve the divergence of some federal courts from this Court's clearly stated rule for review of general verdicts.

1. Review of the Decision Below Does Not Require This Court to Decide an Issue of State Law.

Petitioner argued to the court of appeals that the evidence of plaintiff's blood alcohol was not relevant in this enhanced injury or "crashworthiness" case under Arkansas law. Alternatively, Petitioner argued that any such probative value was substantially outweighed by the danger of undue prejudice under Fed. R. Evid. 403. Appellant's Brief at 25-26.¹

Respondent correctly states that the court below did not explicitly decide whether the admission of this evidence was error. Opp. at 8. It scarcely follows, however that the issue "is simply not ripe for consideration." *Id.* at 9.

The Eighth Circuit held that even if the evidentiary ruling were error, the verdict must stand because "We have no way of determining from this general verdict why the jury found [BMW] not liable," and therefore "Smith has failed to prove that the outcome of the trial was prejudiced by the admission of the evidence." 406 F.3d at 980. This is

¹ Specifically, if plaintiff's neck was broken when her car rolled over, as Respondent contended, there would be no causal negligence or product defect and no liability irrespective of plaintiff's blood alcohol level. But Petitioner's evidence tended to show she was injured by being thrown forward during the front-end impact, and that is precisely the type of injury that the air bag was designed to prevent. What minimal probative value the evidence of intoxication had was substantially outweighed by its prejudicial impact on the Arkansas jury under Fed. R. Evid. 403. Appellant's Brief at 25-26.

precisely the opposite of the *Baldwin* rule, which the Court has consistently upheld.²

For this Court to reassert its rule for reviewing general verdicts and remand for its proper application does not require the Court to decide the underlying state law issue.

2. Petitioner Did Not Waive Objection To the Admission of Prejudicial Evidence of Intoxication.

a. Respondent contends that Petitioner waived any error because "Petitioner agreed to submit the case on a general verdict form." Opp. at 9. Petitioner challenged the blood alcohol testimony in a pretrial motion *in limine* and received a definitive ruling by the trial judge. Petitioner's right to assign error to the introduction of that testimony was thereby preserved. Fed. R. Evid. 103(a). The practice of using the *in limine* procedure is designed to assure that counsel will not have to jump up at each mention of the challenged evidence because continuous objections have the potential to distract and annoy the judge and jury. Although Fed. R. Civ. Pro. 49(b) permits a party to request that special interrogatories be submitted, it does not provide that failure to do so waives any error that such interrogatories might uncover.

Special interrogatories are undoubtedly useful in many circumstances. However, submitting interrogatories to determine whether the jury relied

² "[The verdict's] generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld." *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884).

on prejudicial evidence might well serve to highlight that evidence in the minds of the jurors. Failure to request Rule 49 interrogatories should not be deemed to waive objections that the litigant has otherwise preserved.

b. Respondent points to the fact that Petitioner did not object to the jury instructions on comparative fault. Opp. at 9. Petitioner assigned error to the introduction of irrelevant and highly prejudicial evidence. That she did not also object to the instructions did not waive the evidentiary error.

c. Respondent further notes that "Petitioner did not appeal the sufficiency of the evidence" that the airbag performed properly during the accident. Opp. at 9-10. Both sides presented extensive evidence concerning whether the airbag should have deployed when the car struck the hillside. The fact that Petitioner did not argue that Respondent's evidence was insufficient on that issue does not waive her objection to prejudicial testimony concerning intoxication.

The court of appeals below found no waiver by Petitioner of her objection to the introduction of the challenged evidence. Rather, the court held that Petitioner was not entitled to reversal because she could not prove the jury relied on that evidence in reaching its verdict. It is this ruling that warrants review by this Court.

3. If the Jury Could Have Found For BMW On Another Ground Without Considering the Evidence, the Proper Remedy Is a New Trial.

Respondent's third objection does no more than restate the minority position of the Seventh and

Eighth Circuits rejecting the *Baldwin* rule. Under the minority position, it is presumed that the alleged error did not affect the jury's verdict. An appellant is entitled to reversal only by demonstrating error in each and every alternative basis for the jury's verdict

This position has been described as:

a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that none of the plaintiff's theories will support the general verdict. . . . For reasons explained in *Baldwin*, this rule makes no sense at all, never mind that it contravenes Supreme Court authority.

Kerr. v. Levelor Lorentzen, Inc., 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting).

Indeed, this Court has already rejected Respondent's view. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court reversed and remanded judgment for Omni on a jury's general verdict due to erroneous instructions relating to *Noerr-Pennington* antitrust immunity. Omni contended that there was sufficient evidence to sustain the verdict on other, independent grounds.

Writing for the Court, Justice Scalia answered that the general verdict "cannot be permitted to stand." *Id.* at 365. However,

[I]f the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

Id.

4. That the Challenged Evidence Was Admitted on an Affirmative Defense Does Not Distinguish This Case From *Baldwin*.

Respondent observes that the asserted error below "is not directed to a threshold element of the plaintiff's case, but to an affirmative defense." Opp. at 14. In respondent's view "[t]his critical distinction removes the present case from the *Baldwin* 'general verdict' rule." *Id.*

Such a distinction is without significance, as this Court's own applications of *Baldwin* make clear. For example, in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court, citing *Baldwin*, reversed judgment on a general verdict where the error below was in the application of an affirmative defense, that is, the statutory exemption of agricultural associations from federal antitrust laws. *Id.* 29-30. Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, *supra*, the Court reversed a general verdict in an antitrust action because the jury may have based its verdict on erroneous instructions concerning the affirmative defense of *Parker* and *Noerr* immunity. 499 U.S. at 384.

5. Reaffirmation of This Court's *Baldwin* Rule Will Not Destroy the Utility of the General Verdict Form.

Respondent correctly notes that most civil cases tried to juries in federal court "are resolved and always have been by a general verdict." Opp. at 16. This has been so since 1884 when this Court declared the *Baldwin* rule for review of general verdicts. It has remained so as this Court repeatedly confirmed that rule and as the overwhelming majority of courts of appeals applied it. This Court's

reversal of the Eighth Circuit's sharp departure from this Court's precedents poses no threat to the use of the general verdict form.

Respondent's position is that *Baldwin* applies "in some cases but not in others," and that in any case a party waives objection to prejudicial evidence "when the appellant did not object to the use of the general verdict form." Opp. at 17. It is Respondent who would extract too high a price for a party's use of the general verdict.

6. The Court of Appeals Should Address Whether Introduction of the Challenged Testimony Was Error.

Respondent's final point is that the lower court appropriately avoided deciding a state law question concerning the admissibility of evidence of intoxication as comparative fault.

Respondent is only half right. The court did not decide whether such evidence is relevant in an enhanced injury or "crashworthiness" case under Arkansas law. The court also did not reach Petitioner's alternative argument that, even if relevant, the evidence should have been excluded as unfairly prejudicial under Fed. R. Evid. 403. See note 1, *supra*.

It is entirely appropriate for the Eighth Circuit to reach these questions, and it has done so previously. For example, in *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) the court upheld the district court's judgment that the manufacturer's unguarded outboard motor propeller was not defective as a matter of Missouri law. Though the issue was not determinative, the court also stated, "we conclude that evidence of intoxication is irrelevant in a strict

tort liability action for enhancement of injury." *Id.* at 866 n.3.

The question presented by Petitioner does not suggest that an appellate court in a diversity case may never avoid deciding state law issues. Rather, Petitioner contends that the lower court avoided the evidentiary issue by ignoring this Court's clear and consistent precedents concerning review of general verdicts.

CONCLUSION

For the reasons given above and in the Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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